United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL 74-1739
73-8177

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

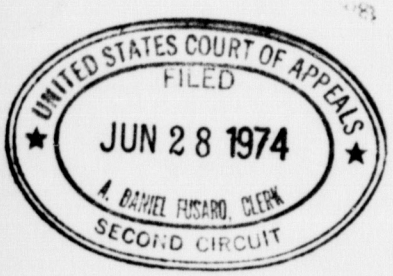
-against-

SOLOMON GLOVER,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Appendix



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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO. 7[illegible]

UNITED STATES OF AMERICA	U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
-against-	CASE NO. *73 Cr. 327*
SOLOMON GLOVER	JUDGE *BRIEANT*
Defendant	

2nd Supplemental Record.

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INDICTMENT IN SOUTHERN DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

-against-

GENNARO ZANFARDINO, a/k/a "Jerry",
JOHN CAMPOPIANO a/k/a JOHNNY ECHOES,
ORESTE ABBAMONTE, a/k/a Ernie Boy,
THOMAS LENTINI, a/k/a Moe,
GEORGE COUMOUTSOS,
JOHN DOE, a/k/a Tommy
SOLOMON GLOVER,
BENITO CORTINO,
JANE DOE, a/k/a Diosdada,
JANE ROE, a/k/a Roberta,
SABINO RIOS,
ARCADIO EORIA, a/k/a Cano Baraca
and JOSEPH MACK,

Defendants.

- X

The Grand Jury charges:

1. From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, GENNARO ZANFARDINO, a/k/a "Jerry", JOHN CAMPOPIANO, a/k/a "Johnny Echoes", ORESTE ABBAMONTE, a/k/a "Ernie Boy", THOMAS LENTINI, a/k/a "Moe", GEORGE COUMOUTOS, JOHN DOE, a/k/a "Tommy", SOLOMON GLOVER, BENITO CORTINO, JANE DOE, a/k/a Diosdada, JOHN DOE, a/k/a Roberto, SABINO RIOS, ARCADIO BORIA,

a/k/a "Cane Baraca" and JOSEPH MACK, the defendants, and Dolores Martinez and Pedro Melicio and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841 (a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. In or about September, 1971, defendant THOMAS LENTINI, a/k/a "Moe", delivered one-half kilogram of cocaine to co-conspirators Dolores Martinez and Pedro Melicio at The Silver Moon Restaurant, 1503 Second Avenue, New York, New York.

2. In or about October, 1971, defendant BENITO CORTINO handed co-conspirator Dolores Martinez $15,000 in United States currency in an apartment on Courtland Avenue between 158th and 159th Streets, Bronx, New York.

3. In or about November, 1971, defendant GENNARO ZANFARDINO, a/k/a "Jerry", met with defendant JOHN CAMPOPIANO, a/k/a "Johnny Echoes" in The Blue Lounge, Bronx, New York.

4. In or about November, 1971, defendants JANE DOE, a/k/a DIOSDADA, and JOHN DOE, a/k/a ROBERTO, received one-half kilogram of cocaine at 1400 University Avenue, Bronx, New York.

5. In or about February, 1972, defendants SABINO RIOS and ARCADIO BORIA, a/k/a "Cano Barasa," met in the vicinity of 1796 3rd Avenue, New York, New York.

6. On or about October 30, 1972, defendant SOLOMON GLOVER met with defendants JOHN CAMPOPIANO, a/k/a "Johnny Echoes," and ORESTE ABBAMONTE, a/k/a "Ernie Boy," in the vicinity of Second Avenue and 57th Street, New York.

7. In or about November, 1972, defendant GEORGE COUMOUTOS transported one-half kilo of heroin to Barone's bar between 116th Street and 117th Street, New York, New York.

8. On or about November 6, 1972, defendant JOHN DOE, a/k/a "Tommy," transported one-half kilogram of heroin to the vicinity of 44th Street and First Avenue, New York, New York.

9. On or about November 6, 1972, co-conspirators Dolores Martinez and Pedro Melicio delivered one-half kilogram of heroin to defendant JOSEPH MACK at 203 Mt. Eden Street, Bronx, New York.

10. On or about January 8, 1973, defendants GENNARO ZANFARDINO, a/k/a "Jerry," and JOHN CAMPIPIANO, a/k/a "Johnny Echoes", met at Bachelors III Restaurant, 798 Lexington Avenue, New York, New York.

(Title 21, United States Code, Section 846).

SECOND COUNT

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JOHN CAMPOPIANO, a/k/a "Johnny Echoes," THOMAS LENTINI, a/k/a "Moe" and BENITO CIRTONO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

THIRD COUNT

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, THOMAS LENTINI, a/k/a "Moe," JANE DOE, a/k/a Diosdada" and JOHN ROE, a/k/a "Roberto," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic druq controlled substance, to wit, approximately one-half kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

FOURTH COUNT

The Grand Jury further charges:

In or about the month of February 1972, in the Southern District of New York, THOMAS LENTINI, a/k/a "Moe," SABINO RIOS and ARCADIO DORIA, a/k/a "Cano Baraca," the defendants, unlawfully, intentionally and knowingly did distribute and possesses with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one

kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

FIFTH COUNT

The Grand Jury further charges:

In or about the month of November, 1972, in the Southern District of New York, JOHN CAMPOPIANO, a/k/a "Johnny Echoes", ORESTE ABBAMONTE, a/k/a "Ernie Boy", THOMAS LENTINI, a/k/a "Moe", GEORGE COUMOUTOS and JOSEPH MACK, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2)

SIXTH COUNT

The Grand Jury further charges:

On or about the 6th day of November, 1972, in the Southern District of New York, JOHN CAMPOPIANO, a/k/a "Johnny Echoes," ORESTE ABBAMONTE, a/k/a "Ernie Boy," JOHN DOE, "Tommy," and JOSEPH MACK, the defen-

dants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half kilogram heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	Before:
	HON. CHARLES L. BRIFANT, JR.
vs.	District Judge.
GENNARO ZANFARDINO et al	
	73 Cr. 327
Defendants.	

New York, July 17, 1973

STENOGRAPHER'S MINUTES

mpa

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
VS.	
GENNARO ZANFARDINO, JOHN CAMPOPIANO a/k/a JOHNNY ECHOES, ORESTE ABBAMONTE, a/k/a Ernie Boy, THOMAS LENTINI, a/k/a Moe, GEORGE COUMOUTSOS, JOHN DOE, a/k/a Tommy (James Patrick Odierno) SOLOMON GLOVER, BENITO CORTINO, JANE DOE, a/k/a Diosdada, JANE ROE, a/k/a Roberta, SABINO RIOS, ARCADIO EORIA, a/k/a Cano Baraca and JOSEPH MACK, Defendants.	73 Cr. 327

New York, New York.
July 16, 1973 - 10:30 A.M.

Before:

HONORABLE CHARLES L. BRIEANT, District Judge.

APPEARANCES:

PAUL J. CURRAN, United States Attorney for the Southern District of New York.
GERALD FEFFER, and
MEL BARKAN, Assistant United States Attorneys.

A P P E A R A N C E S (continued)

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Attorney for Defendant Glover

(At the side bar.)

THE COURT: Do any of you have any written requests for voir dire questions?

MR. FEFFER: Your Honor, I personally handed it up to your chambers. I have not given them to defense counsel.

THE COURT: I received them. I haven't used all of them. I am using my regular format. I don't think there are any that are controversial, but since you handed them in, they should have copies.

MR. GALLINA: Not for the voir dire, unless your Honor doesn't intend to ask the prospective jurors whether they not they have gone to school, what schools they have gone to.

THE COURT: You would like to have an inquiry as to their level of education?

MR. GALLINA: That's correct, your Honor. Whether they went to public school or private school. It doesn't have to be designated.

THE COURT: I wouldn't discriminate between public and private, but I would ask, if requested, how far they went in school, if they finished college or whatever.

MR. GALLINA: And the basic area of the

jurisdiction that they live in.

THE COURT: That we get, anyway.

MR. SANTANGELO: Your Honor indicated that you would cover the area of pretrial publicity.

THE COURT: I will cover it, but I won't say there wasn't any.

MR. GALLINA: As to the males, your Honor, would you ask them if they have had honorable service in the armed services.

THE COURT: I don't see the relevance to this. It's not a draft evasion case.

MR. GALLINA: I realize that, but it gives me an idea --

THE COURT: I am reluctant to go into that. A man may have less than an honorable discharge and still be a good citizen. If it were a prosecution relating to the national defense or something like that I might think it was reasonable to do that.

MR. FEFFER: Really, upon reflection, I think the same can be said for asking members of the panel what level of education they have achieved. I fail to see the relevancy of that to an individual's capability in rendering a fair verdict.

THE COURT: Well, it's borderline, but I

could see that counsel would wonder with some of the elitism we have in our society in this day and age, whether a fellow with too much education could be fair to individuals who assert that they are engaged in manual labor and so forth. So I think that's a reasonable request.

MR. HOFFMAN: If it pleases the court, the only request I would have is whether or not the prospective jurors personally or anyone in their families have had a narcotics problem.

THE COURT: Yes, I will ask them about that.

Now, it would be my intention that the fact of a legal co-partnership between Mr. Hoffman and Mr. Gallina would not be mentioned by the court. I don't think anybody else should mention it except by accident or if anyone wants to mention it.

I take it you have discussed it with your clients and discussed the position with respect to a possibility of a conflict. It could result in a mistrial, but I don't think it is necessary to mention it.

We will select six alternates. You will have one challenge jointly on each side with respect to the alternates.

What about the other challenges? How do you

wish to handle it?

MR. GALLINA: Your Honor, we would ask for an expansion of our peremptory challenges, in view of the number of defendants.

MR. FEFFER: The government would ask that defense counsel consent to an increase in the number of the challenges for the government for the same reason.

THE COURT: I think it could be worked out by counsel to give a fair result all around, but I doubt seriously that I have the power to give the government additional challenges except by stipulation.

MR. FEFFER: That's correct, your Honor.

THE COURT: If you want to stipulate a reasonable adjustment to maintain the existing ratio, that may be a wise move, but I don't require you to.

MR. CHANCE: If your Honor please, with respect to the presumption of innocence, uwould you inquire whether any juror has any quarrel with that rule of law?

THE COURT: Oh, yes, and with respect to any rule of law on which the court instructs the jury.

MR. GALLINA: May we have a moment to discuss the question of the peremptory challenges?

THE COURT: Oh, yes. I don't seek to extort any concessions from you, but you may find it is in the interests of justice.

MR. FEFFER: Your Honor, there is only one other point. There's a fair chance that this case may receive some publicity in the local newspapers.

THE COURT: I would hope not, if everyone adheres to his obligations.

MR. FEFFER: I think the press has already had some of this, and I would request that the court instruct the jury not to read the newspapers while they are sitting or --

THE COURT: I will give that instruction after the jury is selected. Gentlemen, at the risk of becoming a broker, which I don't intend to do, why don't you maintain the original ratio? Why doesn't each defendant take an extra challenge to be exercised individually by himself and give the government three extra?

MR. GALLINA: How many defendants do we have?

THE COURT: Five, and that preserves the six-ten ratio which the rules provide for.

MR. FEFFER: The government agrees with your Honor.

THE COURT: Let's see if they find it acceptable.

(Discussion off the record.)

MR. GALLINA: Your Honor, I think I speak for defense counsel -- if I don't, please correct me -- we would ask your Honor to give each defendant an extra challenge, in view of the fact of the obvious immensity of the case, the immensity of proof, the importance to their lives. But we would object to any increase in the challenges for the government.

THE COURT: Well, I wouldn't be inclined to do that. I would expand the challenges by giving each attorney -- I would give the defendants four additional challenges and I would not expect that these additional challenges would be exercised jointly. I am going to ask you to use them as your own, and not to join with each other in the use of them.

If you find as the proceedings progress that you want to exercise a challenge in your own client's interest without exercising it jointly with the rest you would be allowed to do so, but I'm not disposed to give any additional unless it is by agreement, and I don't suggest that any agreement would be beneficial or necessary. It's just that I know that many attorneys feel

otherwise.

MR. GALLINA: There are five attorneys, your Honor.

THE COURT: You mean each attorney has only one client? That's an awful lot of challenges.

MR. PEFFER: Mr. Gallina's firm represents two --

THE COURT: Well, I am allowing two and putting them out of the case.

Can you take three and use them jointly?

MR. GALLINA: Yes.

THE COURT: All right. I will do that, and if there is any argument or difficulty I will attempt to decide it.

MR. GALLINA: All right. The three of them jointly.

THE COURT: There are one or two other things, if you will come back a moment. There are one or two other things that I don't need to say but I will bring them out now.

Objections by one will benefit all; and I ask you not to be repetitious in your cross examination. Anything brought out is covered for all.

MR. HOFFMAN: In other words --

(A jury was duly impaneled and sworn.)

(Six alternate jurors were sworn.)

United States of America

vs. 73 Cr. 327

Gennaro Zanfardino, et al.

New York, New York.
July 17, 1973 - 10:47 A.M.

(Trial resumed, jury present.)

THE COURT: Good morning, members of the jury.

THE CLERK: United States of America vs. Gennaro Zanfardino, et al.

MR. PEFFER: Government ready.

THE COURT: Mr. Gallina? Defendants ready?

MR. GALLINA: Yes, your Honor.

THE COURT: Members of the jury, before we commence, I would mention briefly to you something concerning our method of procedure which may be of assistance to you.

The Government will make an opening statement outlining its case.

Then each defendant may make an opening statement outlining his case of what he intends to prove. A defendant is not required to make any opening statement because, as I will explain to you later in greater detail, each defendant

is presumed innocent and the Government has the burden to prove beyond a reasonable doubt to your satisfaction all of the essential elements of the crimes which are charged.

Now, the opening statements are not evidence. They are a promise or indication on the part of the lawyers who make them of what they intend to prove. This is permitted merely to aid you in generally understanding the nature of the case and the significance of evidence when it is introduced.

After the opening statements the Government will introduce its evidence, and at the close of the Government's evidence each defendant has the right to introduce evidence. However, he is not required to do so.

Rebuttal evidence may be introduced, and at the closing of all the evidence the attorneys may make their closing arguments to you.

Now, the law applicable to this case will be contained in the instructions I give you during the course of the trial and at the end of the closing arguments, and it is your duty to follow my instructions as to the law.

It is your function to determine the facts and to determine them from the evidence and the reasonable

inferences flowing from the evidence. In doing so, you are not to indulge in guesswork or speculation.

Now, from time to time it may be the duty of the attorneys to make objections, and I will rule on these objections and determine whether you can consider certain evidence. You must not concern yourselves with the objections or with my reasons for the rulings which I may make and you must not consider testimony or exhibits to which an objection was sustained, and you may not consider evidence which has been ordered stricken out.

It is also possible that there may be evidence which applies only to one or two or perhaps not to all of the defendants. When such evidence is received, you will be told that that is its purpose and it is essential that you bear that in mind.

Now, until this case is submitted to you for your deliberation, you must not discuss it with each other or with anyone or remain within the hearing of anyone discussing it.

You should not read any newspaper article or listen to any radio broadcast or view any television program which might bear upon the case or the subject matter of the case.

You should not visit any of the scenes or places which may be mentioned in the testimony, and you are not to speak to any of the attorneys or parties or witnesses. That instruction even includes good morning. You are not to be engaged in any conversation in any way whatscever with anycne in this case.

Now, only when the case is fully submitted to you for your decision and when all the arguments are all the evidence and the Court's instructions have been received then you may deliberate the case, and than only in the jury room when all members of the jury are present.

Most important, it is so important that I will repeat it to you as the trial progresses, until this case is fully submitted to you you are to keep an open mind and you must not decide any issues in the case until the case is fully submitted to you for your deliberation under the instructions of the Court. Until that time please do not reach any premature conclusions.

All right. Now, Mr. Feffer, you may make an opening statement for the Government.

MR. FEFFER: Thank you, your Honor.

Judge Brieant, Mr. Gallina, Mr. Santangelo, Mr. Breitbart, Mr. Chance, ladies and gentlemen of the jury:

As his Honor told you, my name is Gerald Feffer. Both Mel Barkan and myself have the privilege and the obligation to prosecute this case on behalf of the Government of the United States of America.

Now, when I say prosecute, ladies and gentlemen, it is because these defendants are charged with crimes. They are charged with violations of the Federal narcotics laws, including a conspiracy to distribute narcotic drugs throughout this community, and before you see or hear any of the evidence in this case I have this brief opportunity to make a few opening remarks to outline to each of you what the proof will be at trial and to tell you how the Government will prove its case at trial.

My purpose at this time is simply to provide you with a brief overall picture, a road map if you like, of what the testimony will be at trial, what exhibits will be introduced at trial so that in that way you may better understand the trial as it unfolds.

Now let me emphasize at the outset that nothing that I say, that Mr. Barkan says or that any defense counsel says during the course of this trial is evidence of any type.

The only evidence comes from that witness stand

and from the exhibits that are received in evidence.

An indictment has been filed by a grand jury sitting in this courthouse, like yourselves, charging 13 defendants with violations of the Federal narcotics laws. They are Gennaro Zanfardino, also known as Jerry; John Campopiano, also known as Johnny Echoes; Oreste Abbamonte, also known as Ernie Boy; Thomas Lentini, known as Moe; George Coumoutsos; John Doe, also known as Tommy, Solomon Glover, Benito Cortino, Jane Doe, also known as Diosdada, Jane Roe, also known as Roberta, Sabino Rios, Arcadio Boria, also known as Cano Baraca, and Joseph Mack.

Now, an indictment is simply an accusation made by this grand jury against those defendants. Nine of these defendants, Thomas Lentini, Oreste Abbamonte, George Coumoutsos, John Doe, Tommy, Benito Cortino, Jane Doe, Diosdada, Jane Roe, Roberta, Sabino Rios and Joseph Mack are not on trial before you today and consequently you need not consider their guilt or innocence.

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Let's take a brief look at the indictment, which contains six counts or charges. The first count charges the defendants with a conspiracy. The indictment charges, and the government will prove, that the defendants conspired together to distribute heroin and cocaine throughout the New York community.

His Honor will instruct you at the end of the trial as to what constitutes a conspiracy under our law. But very simply a conspiracy is merely an agreement between two or more people to violate a law, and in this case the Federal Narcotics Laws.

The government at trial will prove the existence of this conspiracy and the membership of each defendant in that conspiracy. Some of these defendants played major roles, some minor, some were members of the conspiracy at the outset, others joined later, and some members may not have known other members in the conspiracy. But the government will prove, in any case, that each defendant knowingly joined and participated in that conspiracy.

The government will also prove that these defendants were successful in carrying out the illegal objects of this corspiracy, and thus counts 2 through 6, counts that we refer to as substantive counts, charge

actual distributions of heroin and cocaine by certain defendants, and I'll return to those counts momentarily.

Now, how will the government prove the charges contained in the indictment? The government's proof will show that Gennaro Zanfardino was at the highest level of a massive narcotics distribution system which was cnetered on Pleasant Avenue in New York City. Zanfardino, the evidence will show, was the man behind the scenes, the supplier.

Now, the evidence will further show that John Campopiano, known as Johnny Echoes, Thomas Lentini, known as Moe, and Oreste Abbamonte, known as Ernie Boy, were his trusted lieutenants. They were the individuals who organized and directed Zanfardino's narcotics business. Again, Lentini and Abbamonte are not on trial before you today.

George Coumoutos and James Odierno, who is also known as Tommy, were the delivery boys, the boys who circumlated throughout the streets handling packages of narcotics. These men are also not on trial before you today. And I will address myself to the defendants Solomon Glover and Arcadio Borja in a moment.

Now, during the fall and winter of 1971 and 1972, the evidence will show that this organization

operated to a large extent out of the Bronx and many of the meetings took place in the Blue Lounge in the Bronx.

Now, when the weather turned nice last summer this organization shifted its theater of operation to Pleasant Avenue in Manhattan.

The New York City Police Department wasn't far behind, and in fact in July of 1972 the intelligence division of the New York City Police Department managed to rent a small apartment on Pleasant Avenue overlooking the avenue, and from that location they were able to take many reels of videotape. Many of these sequences, or many sequences from these reels, will be introduced at this trial.

Now, the base of operations, and I will refer to the blackboard, was a barbershop on Pleasant Avenue between 117th Street and 118th Street. Gennaro Zanfardino and his people, as the evidence will show, went to that barbershop almost daily during July, August, September, October, November and even into the winter of 1973, and it was from that barbershop that Gennaro Zanfardino directed this narcotics distribution system.

The evidence will show that rarely if ever did anyone ever get a haircut in that barbershop.

Now, from these films of Pleasant Avenue it

was learned that Solomon Glover, a defendant on trial before you, was one of the many individuals who went to Pleasant Avenue to buy narcotics, and the evidence will show Glover going to Pleasant Avenue, filmed meeting with certain people for the purpose of buying narcotics..

The film also reveals that a young lady and her male escort also made frequent trips to Pleasant Avenue. Now,these two would generally drive up to the avenue and converse with Campopiano, Lentini and Abbamonte. The woman's name turned out to be Dolores Martinez, or Didi. Her male escort was her common law husband Pedro Melicio.

Didi and Pedro were ultimately arrested by the New York State authorities for violation of the New York State narcotics laws, and I believe the date of arrest for Didi was December 12, 1972. Following her arrest Miss Martinez, or Didi, began cooperating with the authorities, and in that capacity she continued to deal as directed by the Bureau of Narcotics and Dangerous Drugs with the people that she had been seeing on Pleasant Avenue, but this time she began taping telephone conversations. She would meet these people wired, or carrying a Kel as we call it. Video-tapes were taken of several of the meetings that she had

with Campopiano, Abbamonte and Lentini, and this evidence will be presented to you through the testimony of Dolores Martinez.

Now, as I indicated, counts 2 through 6 are the substantive counts. These counts charge specifically distributions of narcotics. Count 2 charges, and the government will prove, that in or about the month of October 1971 that John Campopiano, known as Johnny Echoes, Thomas Lentini, known as Moe, distributed to Dolores Martinez one kilo of cocaine and that she in turn took that kilo of cocaine and resold it to an individual by the name of Benito Cortino. Again, Mr. Cortino and Lentini are not on trial before you.

I will briefly now refer to the remaining counts of the indictment. Count 3 charges that in or about the month of October 1971 that Thomas Lentini distributed a half kilo of cocain to Dolores Martinez and that Dolores Martinez in turn sold this half kilo to a woman named Diosdada, and a man named Roberto.

Now, again, Lentini and Diosdada and Roberto are not on trial before you today.

The fourth count charges that Lentini in the month of February 1972 sold approximately one kilogram of heroin to Dolores Martinez, and she will testify to that transaction and to the fact that she took that kilo of heroin and resold it to Arcadio Boria, who is on trial before you today.

Count 5 charges that in or about the month of November that Campopiano, Abbamonte and Lentini and Coumoutsos transferred a half kilogram of heroin to Dolores Martinez and that she in turn took this half kilo and resold it to an individual by the name of Joseph Mack, who is not on trial before you.

And finally the sixth count charges that in or about the sixth day of November 1972, that Campopiano, Abbamonte, John Doe Tommy transferred, distributed to

Dolores Martinez again a half kilo of heroin which they in turn distributed to Joseph Mack. She will be on the stand and she will testify to each of the substantive counts that I referred to.

Now, Gennaro Zanfardino, as you can see, is not named or charged in any of these substantive counts. The evidence will establish that he never dealt directly with customers, such as Didi. He supplied the men with the narcotics and permitted them to personally take care of the customers of his organization.

The defendants in this case were arrested on April 14, 1972.

THE COURT: 1973, isn't it?

MR. FEFFER: I am sorry, your Honor. '73. Excuse me.

And the evidence will establish that shortly after this arrest the defendants Zanfardino and Campopiano and others offered a police officer $200,000 to get rid of the video tapes that I have referred to that were taken on Pleasant Avenue, and to locate and kill Dolores Martinez

The evidence will also establish that Gennaro Zanfardino was the man calling the shots, the man who ordered that Didi be hit, that she be eliminated. And the police officer who received the $100,000 and who immediately

reported that to the authorities will testify, and through him $100,000 that he received for this purpose will be introduced.

Now, I want to make it very clear at this point that the defendants Glover and Boria were in no way involved in this attempt to destroy evidence and to murder a government witness.

Now, that is the case in a nutshell, ladies and gentlemen, and those of you who have sat on a jury before know that this case cannot come in as a story. By our rules of evidence each witness can only tell you what he or she saw. They cannot describe for you what other people may have seen, and in a sense it is like constructing a jigsaw puzzle.

MR. CHANCE: If your Honor please, I hate to interrupt but he is intruding into your Honor's area, he is not showing what he is offering to prove but he is now --

THE COURT: He is getting close, Mr. Chance.

MR. CHANCE: I believe he has gotten a little too close.

THE COURT: All right. Let's conclude the opening as promptly as you can.

MR. PEPPER: In any case, the evidence does come in piece by piece. But at the end, ladies and gentlemen, the picture will be complete and clear as to the guilt of each of the four defendants that are on

trial before you.

This case is not a difficult one, it is not a complex one. It is relatively simple. If you pay close attention to the testimony elicited from that witness stand and to the exhibits that are received, your job will be a relatively simple one.

Ladies and gentlemen, one last observation. Please don't make up your minds as to the guilt or innccence of any of the four defendants on trial before you until such time as you have heard all the testimony, until such time as you have heard his Honor instruct you on the law, until such time as you have applied the facts as you find them to that law. And if you do that, everyone in this courtroom will receive a fair trial, and that is why we are here.

Thank you.

THE COURT: Mr. Gallina, you may make an opening statement on behalf of Mr. Zanfardino, but you are not required to do so.

MR. GALLINA: Yes, your Honor, I desire to make an opening statement.

Ladies and gentlemen, your Honor, members of the bar:

It was not my intention to make an opening

statement until about 30 seconds ago. I did not prepare one. But I want to direct my statements to what I intend to show you, the members of the jury, as being evidence in this case.

I agree with the prosecutor. He will not be able to show that my client ever dealt directly in narcotics. I agree with him. There will be a complete absence of evidence, and I will be able to show that by cross examination.

He has made only one statement about offering any proof, or two statements about proof. He says, one, he is going to be able to show that Mr. Zanfardino supplied both his men with narcotics. I say to you, and I ask you to hold me to my promise to you, that I will show you through witnesses of the government and whatever witnesses, if necessary, the defendant desires to put on that he never supplied his men, and there is no proof that he ever supplied anybody, with narcotics.

And third of all, there was only one other element of proof mentioned by the government in its opening statement which it says it is going to prove, that Mr. Zanfardino, as evidence of his guilty knowledge of what he was doing and what he was involved in, had attempted to assist others or ordered others to kill a

witness.

There may be evidence that certain witnesses or certain defendants or co-conspirators may have desired to do such a thing, and I ask you to examine that evidence, whether it be tape recordings or whatever it is. But I say to you now that we will be able to show and prove, and I ask you to hold me to my promise, that there is not one scintilla of evidence against Mr. Zanfardino that can be found against anybody else.

That is very simple. That is my opening. You hold me to my promise and I hold you to yours to make your decision according to the evidence in this case.

MR. SANTANGELO: If your Honor please, may I approach the side bar?

THE COURT: Yes.

(At the side bar.)

MR. SANTANGELO: From the government's opening, your Honor, it seems that the government is going to prove acts and occurrences which happened in the winter of 1971 and which occurred in the spring of 1972, prior to the July video taping.

I had contended on a prior motion to suppress, your Honor, that this was evidence which the government will use. I think I have been borne out by the govern-

ment's opening.

The government contended at the taint hearing that its evidence was independent of anything that happened prior to July, 1972, from what I understand of the government's argument, your Honor. I would renew my motion to suppress and also make a motion at this time to dismiss the indictment with regard to the defendant Campopiano.

THE COURT: Your motion to suppress has remained open because of exigencies affecting my inability to make a complete record, which was beyond my control, and that was, I believe, at your request that it remained open, and of course it will continue to remain open throughout the trial.

In all other respects, however, your application is denied.

MR. GALLINA: Your Honor, under the government's continuing obligation to satisfy your discovery orders, I would have, since the government has opened and mentioned that there are certain statements that my client made concerning a hit, evidently the government is in possession of these statements. I would ask them to furnish me copies of these statements at the earliest possible moment. I have not been furnished

with such statements.

MR. FEFFER: The government has furnished all defense counsel, including Mr. Gallina, with the tape recordings that were taken during the course of that investigation.

THE COURT: That is the only statement you are talking about?

MR. FEFFER: That is the only statement that we have that is contained on any type of tape or writing. The other statements which will be introduced are verbal statements made by the defendant during the course of the conspiracy.

THE COURT: To whom?

MR. FEFFER: To the police officer undercover. They are not incorporated in writing and they are definitely not the subject of a discovery under Rule 16(a) and (b).

THE COURT: Are they on the Kel?

MR. FEFFER: No, your Honor. They were not recorded.

THE COURT: I have to take this up later with you. I want to proceed with the openings. We are unduly prolonging the trial.

(In open court.)

THE COURT: Members of the jury, from time to time the attorneys will have conferences with the court at the side bar here. That has nothing to do with the evidence. It is merely to assist the counsel in doing their work and to assist the court in the conduct of the trial. You are to pay no attention to the fact that we have these interruptions. Nothing that is said there affects your work. If you should happen to overhear anyone say anything there, you must put it absolutely out of your mind.

In this room it is possible to talk at the side bar, I think, without being heard, but if you should happen to hear anything, disregard it.

All right, Mr. Santangelo.

MR. SANTANGELO: I waive opening at this time, your Honor.

THE COURT: All right.

Mr. Chance?

MR. CHANCE: If your Honor please, at this time the defendant Solomon Glover does not wish to make an opening statement.

THE COURT: All right.

Mr. Breitbart?

MR. BREITBART: The defendant Boria also

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waived his opening.

THE COURT: All right. Members of the jury, at this time we will take a very brief recess. Then we will proceed with the trial. You may withdraw to the jury room for the purpose of having a recess.

(The jury left the courtroom.)

THE COURT: Mr. Feffer, you can resume in a moment. Stay right where you are.

I would like to continue the discussion we were having atthe side bar. If I had known the rest of the attorneys were going to waive their opening, I could have sent the jury out and continued it at the time. However, that is of no import.

What is the story about the statement that was made to the officer?

MR. FEFFER: Your Honor, the government had turned over to defense counsel all the statements that were recorded on tape.

THE COURT: I assume this officer is working in a quasi-federal capacity, isn't he?

MR. FEFFER: That's correct. But the law is very clear that statements made during the course of a conspiracy to an undercover officer, whether it be during a narcotics transaction, or whether it be in this

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situation, a bribery transaction, are not discoverable under 16(a), and I can cite several cases for you on that point.

THE COURT: He is not an undercover officer.

MR. FEFFER: Your Honor, at that time he was in the midst of a conspiracy in which he was playing the part of a corrupt officer. Various oral statements were made to him during the course of that conspiracy. Those that were recorded have been turned over completely, copies of the tapes have been furnished.

Statements made during the course of the conspiracy which were not recorded the government has no obligation to turn over, pursuant to Rule 16(a), and I can cite, if your Honor would like, several cases on that point.

THE COURT: You are assuming he is an undercover officer, undercover agent.

MR. FEFFER: Your Honor, that --

THE COURT: I will take your citations, but it seems to me it would be a reasonable thing to disclose such a statement.

MR. GALLINA: Your Honor, how can the defendant, leaving aside the law -- common sense dictates

here that we can't prepare --

THE COURT: Common sense is a very fine thing to fall back on.

MR. GALLINA: I am going to argue the law also. I think the law is on our side.

THE COURT: All right. Let me have your citations and I will take it under advisement and I will rule on it as promptly as possible.

MR. GALLINA: This is a surprise, your Honor.

THE COURT: If it is not a matter of serious import to the government, I think you should be practical and give it to him, Mr. Feffer. If the case law is clearly the other way, I will follow the case law. I stand willing to read.

MR. FEFFER: What Mr. Gallina is asking for is every conversation that took place between his client and other clients, Mr. Campopiano, that took place during the course of this period when Detective Del Corso was acting undercover. He is asking for all statements.

THE COURT: I understand he is asking for statements made to Del Corso, whom he used as a federal agent. I think he is asking for statements his client

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made to Del Corso, not statements they made to each other.

MR. FEFFER: He is asking for the entire line of proof in advance of trial.

THE COURT: I don't think he is. I think he is asking for statements made to a police officer.

MR. GALLINA: And any conversation the police officer participated in with my client.

THE COURT: No, not any conversations. Don't broaden it. We are talking about statements.

MR. GALLINA: Statements by my client made in communication with the police officer.

THE COURT: You don't have to make it extensive. You can give it to me in pen and ink. But I will take your authorities and I want to rule on it very promptly.

MR. FEFFER: I can do that in a five-minute recess.

THE COURT: All right. We will take another five minutes, gentlemen.

Did you want to be heard, Mr. Chance? I didn't mean to cut you off there.

MR. CHANCE: Not at all. I wanted to speak to the prosecutor for a minute.

THE COURT: All right. That you may do.

MR. CHANCE: I assume that the application made by Mr. Gallina will be applicable to each of the defendants.

THE COURT: It is not claimed your client was any party to this at all.

MR. CHANCE: No. I am saying if so.

THE COURT: Well, it is not claimed he is.

(Recess.)

United States of America

vs. 73 Cr. 327

Gennaro Zanfardino, et al

New York, New York.
July 23, 1973 - 10:30 A.M.

(Trial resumed.)

(In open court; jury absent.)

MR. GALLINA: Your Honor, the defendant Zanfardino has an application. I believe that the application could be best made in chambers. I have discussed it with other attorneys.

THE COURT: I will take you in just a moment. First I want to take Mr. Chance's application.

It looks pretty clear to me, Mr. Chance, that to admit any of this statement would violate the Bruton Rule.

MR. CHANCE: Judge, in view of that, after consultation with my client, I don't feel at this time that I can make the motion which I had anticipated making at this time. I have discussed it with my client and I have had the benefit of my own experience, and I believe that I stand on solid ground.

I am unable at this time to make the application as we had discussed and had anticipated.

THE COURT: I had indicated to you that I thought your client was entitled to a severance and a mistrial because of the fact that I cannot allow this testimony because it would violate the rights of the other defendants here, which are three in number.

MR. FEFFER: Your Honor, the Government has discussed that matter with Mr. Chance late on Friday and also this morning, and of course at that time there was some belief on the Government's part that a motion for a mistrial would be made on behalf of Mr. Glover.

The Government, of course, at that time indicated that it would consent to a severance and to a trial of Mr. Glover by himself.

THE COURT: You have two alternatives open to you, Mr. Feffer. You may either proceed without using the statement or you may move for a severance and mistrial.

MR. FEFFER: The Government's application at this time, your Honor, is for a severance of the defendant Glover.

THE COURT: You see, I cannot permit the statement to be introduced. It would be unduly prejudicial even with redaction. I am sure these other defendants would

not consent to any redaction. They have indicated to me that that is their view, and I think it is a proper one.

MR. PEPPER: It is based on the Government making an application for the severance.

THE COURT: All right. The application for a severance and a mistrial is granted and you have an exception.

MR. CHANCE: May I at this time make an application to this Court to set bail?

THE COURT: As I understand it, Mr. Glover is presently in the custody of the State?

MR. CHANCE: That is correct.

THE COURT: So that bail at this particular moment for him is academic. I will not retry his case. It will be sent out for reassignment to another Judge, and that will happen almost immediately. So I would suggest that you make application for a review of his bail obligations to whatever Judge becomes charged with the case.

So I will satisfy the writ as to Mr. Glover and he can return to the State custody.

MR. CHANCE: But I would assume any further argument that I make would be an act of futility, then, as

relates to bail, I mean before you.

THE COURT: I am not denying bail, but he is presently confined and remains so for at least another month, maybe more.

MR. CHANCE: What I want to say about that is --

THE COURT: Let the Judge who has charge of the matter be responsible for his continued presence. It is denied without prejudice to renew to the Judge who will have the case.

MR. CHANCE: All right.

THE COURT: All right.

Now, do I understand you want to confer, do you, Mr. Gallina?

MR. GALLINA: Yes, your Honor.

MR. FEFFER: There are some other matters we might take up on the record at this time.

Last week, I believe on Friday, I brought to your Honor's attention that I felt Mr. Gallina's reference to the Family Court law that he made during the cross-examination of Dolores Martinez was incorrect.

I asked at that time whether Mr. Gallina would stipulate with the Government as to what the law was in this regard, and I believe he said he wanted some time

to check into it and to come back to your Honor.

THE COURT: I want to check with the jury, Mr. Feffer.

I want to get into the practice of starting on time or as nearly so as possible. I asked them to be here at ten.

They were here at 10:00. If you don't start on time, then they don't come in on time.

MR. FEFFER: Fine.

THE COURT: Mr. Gallina is reminded that he has that matter under advisement.

All right. I will see you inside.

MEMORANDUM AND ORDER

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SAME TITLE

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Brieant, J.

Beginning on July 16, 1973, defendants Gennaro Zanfardino, John Campopiano, also known as Johnny Echoes, Arcadio Boria and movant, Solomon Glover, were brought to joint trial before the Court and a jury. On July 23, 1973, after four days of trial, the Court severed the case against defendant Glover, and directed a mistrial without his consent.

Defendant Clover raises by motion the issue of whether the prospective impanelling of another jury to try him would violate his constitutional rights, and specifically his rights under the Fifth Amendment of the United States Constitution not to be placed twice in jeopardy for the same crime.

Mr. Glover was originally indicted as one of 13 defendants. He was charged along with all of these defendants, with the crime of conspiracy to deal in scheduled narcotic drugs (cocaine and heroin). Do-defendants Oreste Abbamonte, Thomas Lentini, George Coumoutsos, James P. Odierno and Joseph Mack each

pleaded guilty. Gennaro Zanfardino, John Campopiano and Arcadio Boria were each convicted at the conclusion of the jury trial previously referred to. Defendants Benito Cortino, Jane Doe, a/k/a Diosdada, John Roe, a/k/a Roberto, and Sabino Rios were never apprehended.

This indictment, and others, resulted from a remarkable, sustained cooperative effort between State (City of New York) law enforcement officials and federal agents of the Drug Enforcement Administration (formerly Bureau of Narcotics and Dangerous Drugs). The proof at trial showed a typical narcotics conspiracy of substantial size which had operated regularly and continuously in the District for almost two years.

Zanfardino and Campopiano were substantial traffickers in narcotics, on a scale which may be characterized as simply vas.[1] Their indictment and subsequent conviction resulted directly from the fortuitous apprehension and arrest of one Dolores Martinez, also known as "Dee Dee", who was an essential link in the marketing channels for narcotics utilized by the principal figures. These top level dealers wholesaled narcotics through various levels of less important conspirators, to the street addict purchaser for ultimate use.

Dee Dee had the information essential to the exposure of this ring. After her apprehension, she agreed to cooperate and testify for the Government. Her testimony resulted in the conviction of Zanfardino, Campopiano and Boria. The multi-tiered nature of the organization was such that she had no contact with Glover.

Prior to the start of trial, serious threats had been made against Dee Dee's life. Zanfardino, Campopiano, Lentini and Abbamonte, together with Louis Inglese, and Joseph Sparaccio, persons not involved in this indictment, were separately indicted (7e Cr. 651-HLP) for the crimes of bribery and obstruction of justice. They had agreed to pay $215,000.00 to obtain, among other things, Dee Dee's address, in order that she might be murdered. Of this bribe, $100,000.00 was paid in cash to two New York City policemen, posing as corruptible.

At the time of the trial, Dee Dee was in protective custody. The Government had agreed with her to arrange for her relocation in a new community, and to establish a new identity for her, upon the conclusion of this and other cases, because of a real continuing threat to her life.

Glover concededly had nothing to do with this high level organized crime activity engaged in by Zanfardino, Campopiano and the others named. Viewing such evidence as was received or tendered, from a point of view most favorable to the Government, Glover's participation in the narcotics distribution conspiracy was minimal. He was at most a low level distributor.

The affidavit of Assistant United States Attorney Mel P. Barkan, sworn to October 2, 1973, read in opposition to this motion, states (p. 5) that written reports of three oral statements made by Glover, each of which implicated co-defendant Campopiano and others, "had been turned over to Glover's attorney earlier." See pp. 9, et seq. of Transcript of Pre-Trial Hearing held May 24, 1973. These statements, however, were not turned over to the Court, and had never been viewed by the Court, until late in the afternoon of Friday July 20, 1973. See pp. 716, et seq. of the transcript of trial for that date. There was also a fourth similar oral admission of Glover at a pre-arraignment interview with AUSA Feffer.

Immediately upon viewing the reports of the oral statements of Glover, the Court advised counsel for the Government and all defendants, in a conference

in the robing room (Tr. p. 716):

> "I would like to fill the day's work here, even if it means some disjointedness in the presentation. It looks to me as if an attempt to admit this statement ... does present a Bruton problem, and possibly a problem greater than that.[2] So, I think I'll give you an opportunity to organize your thoughts on it and give me briefly what you have in mind on it. But it may present a problem here."

The discussion was inconclusive. The Government offered (Tr. pp. 717-18) to:

> "file a memorandum on the point of probable cause [for Glover's arrest without a warrant, and subsequent search] with your Honor hopefully late today, and also cover the Bruton problem as well."

Thereafter, in order to conserve the time of the jury, the testimony of a witness was taken not relating to the Glover admissions. This testimony was the first evidence received in the trial bearing upon the guilt of Glover.

The Government maintained that no Bruton problem existed with respect to Glover's statements. It proposed to redact from the testimony concerning the oral statement, as reduced to writing by Agent Fred Gormandy, all reference to co-defendant Campopiano,

including mention of Campopiano's presence, together with Glover, Curtis and Abbamonte at 116th Street and Pleasant Avenue, in connection with the narcotics transaction. But, under the proposed redaction, Abbamonte's name would remain.

Abbamonte was a co-defendant and conspirator who had pleaded guilty. His association with Zanfardino and Campopiano was extremely close, evidenced by the continual mention of his name in the testimony of Dee Dee, and also numerous scenes shown to the jury from 106 reels of video-tape photographed on Pleasant Avenue and showing Abbamonte, Campopiano Zanfardino, Glover and others engaged in what appeared to be narcotics transactions, on the street, at all hours of the day and night.

Dee Dee's testimony and the video-tapes tied in Campopiano and Abbamonte directly with the events detailed in Glover's confession, and the admission of the statement clearly would have been extremely prejudicial to Campopiano. The statement also, even if redacted as proposed, tied in with independent evidence of Officer Tuerack corroborated so much of the confession as referred to Abbamonte, Curtis and Glover, and their activities on October 27 and 30,

1972 at the Pleasant Avenue open-air narcotics mart. The direct testimony of Tuerack and the tapes had involved Campopiano with Glover, Curtis and Abbamonte, and had placed Campopiano there at the same times and places referred to in the disputed statement made by Glover.

Under the circumstances in which the proof would have been presented to the jury, it would have been impossible for the jury not to treat the statement, even with the proposed redactions, and notwithstanding any instructions which the Court might have given, as incriminatory of Campopiano, as well as incriminatory of Glover.[3]

This, in sum, is what the entire teaching of Bruton forbids. Bruton tells us that in a joint trial the introduction of the confession of one defendant which incriminates a co-defendant poses an unacceptable risk that the jury, despite instructions to the contrary, will consider the confession in determining the guilt of the co-defendant in violation of his Sixth Amendment right of cross-examination. Bruton v. United States, 391 U.S. 123 (1968).

Here, elimination of references to Campopiano in the confession of Glover, as suggested by the

Government, would not have removed the risk the Bruton holding was designed to obviate. The substance of the confession, viewed against the background of the other evidence admitted against Campopiano and Zanfardino would incriminate these defendants, and absolutely, though specific references to them were eliminated.

The witness Gormandy showed that he, acting as a Special Agent for DEA, was on Pleasant Avenue on October 30, 1972 at 11:15 P.M. His purpose was surveillance against possible narcotics transactions taking place on the Avenue.

While engaged in such surveillance, and in response to a radio signal, Gormandy moved into a position to take up surveillance of a Buick Riviera, white over green. As a result of a radio contact, he was looking for two black males driving that automobile. He saw the vehicle stop between 58th and 57th Streets on Second Avenue, facing south. He passed it and stopped on the next block. The Buick later passed him and went east on 56th Street into Sutton Place. He then entered East River Drive and initiated a chase of the Buick which proceeded north on the East River Drive at speeds exceeding 90 m.p.h. It turned off into Harlem River Drive, which it left by the 155th Street exit.

He caught the vehicle at Seventh Avenue and 149th Street, where he pulled it over and arrested the occupants, who were Glover and Curtis. He transported them to the 32nd Precinct.

Direct examination of Gormandy had not been completed when the Government at its request and near the close of the day, sought to suspend. (Tr. p. 750). The foregoing was the only proof elicited, to that point, against Glover. The Court believes, although the record does not so state expressly, that the prosecutor sought leave to suspend Gormandy's direct examination because it would have been at this time that the controversial statement incriminating Glover, Curtis, Campopiano and Zanfardino would have been reached in logical order and introduced.

An end-of-day conference of all counsel followed in the robing room. To the extent that the conference was not recorded by the court reporter, the Court rejects any reliance thereon. It would be impossible to conduct a lengthy, multi-defendant case if the Court were unable to have informal, un-recorded conferences with counsel, looking towards expediting the trial, and alerting the Court to potential difficulties, matters of scheduling and

minor problems. No such conferences were ever held except in the presence of both sides, prosecutor and defense counsel. Some informal interchange of ideas, without taking a position, is essential between the Court and counsel in order that the attorneys, as officers of the Court, may deal fairly with each other and with the Court in such conferences, without jeopardizing the rights of clients.

Whenever a matter of urgency is being discussed, the Court may hear it in open Court in presence of the defendants, which is this Court's ordinary procedure, or, alternatively, direct that a stenographic transcript be made in the robing room. But when, in a spirit of informality, proceedings take place in the robing room, which are, by direction of the Court or its inaction, not recorded, the Court should not rely on anything said at such conference to the detriment of a litigant. In its disposition of this motion, the Court rejects in the entirety, any suggestion that the defendant is estopped in any manner, or waived any rights as a result of proceedings not recorded.

The matter at page 756 of the stenographic

record, taken the next morning, places the issue in context. It is clear that defendant Glover's counsel had been persisting in his continuous application for a severance and mistrial, and also that the Government had opposed such relief. When Glover, seeking to lay the foundation for the within motion, withdrew his application, the Court advised the prosecutor as follows:

> "You have two alternatives open to you Mr. Feffer. You may either proceed without using the statement[s], or you may move for a severance and mistrial."

The Government moved for a severance as to the defendant Glover. The Court ruled:

> "You see, I cannot permit the statement to be introduced. It would be unduly prejudicial even with redaction. I am sure these other defendants would not consent to any [admission in evidence, even with] redaction. They have indicated to me that that is their view and I think it is a proper one."

The Government's application was granted. The Court finds that the severance and mistrial was granted against the objection of defendant Glover, and the Government's contention that there was any waiver on his part or by his attorney is totally

without foundation. See Tr. p. 757, in which the Court said:

> "The application for a severance and mistrial [by the Government] is granted, and you [i.e. Mr. Chance, Glover's counsel] have an exception."

In view of that ruling,and the express granting of an exception, it would have been inappropriate for Mr. Chance to have made any further objections or to have prolonged the record and delayed the trial with unnecessary speeches. That he did not do so may not redound to the detriment of his client on this motion. He did all that a trial advocate should be deemed required to do to make and preserve his point and protect his client's rights.

We are left therefore with simple questions which may be phrased thus:

1. When, as in this case, the prosecutor has proceeded in good faith with the joint trial of two or more defendants on a single indictment in a conspiracy case, and intends in good faith to use a redacted statement [confession] by one of the defendants believing in the evidentiary context of the entire trial that, if redacted, the statement will

not be unduly prejudicial to other defendants, or violative of the teachings of Bruton, and the Court decides, to the surprise of the prosecution, that the statement may not be used, may the Court grant a mistrial as to the confessing defendant and continue the trial as to the non-confessing defendant?

2. In reaching such a decision may the Court rely upon the fact that, as in this case, substantial evidence had already been received by the jury as against non-confessing defendants, but hardly any proof had been taken against the confessing defendant?

3. May the Court be guided by the fact that, as here, the non-confessing defendant is a major malefactor, and recidivist, in whose trial Society has an important stake, while the confessing defendant is a relatively minor wrongdoer?

4. May the Court's determination be affected by the expense and waste of resources which would have resulted in this case if a mistrial had been granted to Campopiano, and the trial continued as to Glover?

We think all the above questions are to be answered in the affirmative. Clearly, the Court was

required either to allow the trial to proceed with respect to Glover, without using the confession so that a minor malefactor who has admitted his guilt on several occasions would be acquitted, and the interests of Justice defeated, or give a mistrial and severance to the substantial co-defendant Campopiano [and possibly also to Zanfardino, who may have had Bruton rights under the circumstances] with the result that several days of trial and considerable effort expanded in guarding the life of Dee Dee would have gone for naught, and the case would have had to have been rescheduled later at a tremendous social and financial cost.

The propriety of our Bruton ruling requires consideration, but is not crucial to the determination of the double jeopardy issue in the absence of bad faith, prosecutorial misconduct or an intention of oppress. The Bruton case did not require that confessions never be admitted in joint trials. See 391 U.S. at 134. In this Circuit and elsewhere, properly redacted confessions have been held to satisfy Bruton's requirements under the facts of particular cases. See, e.g., United States v. Trudo, 449 F. 2d

649 (2d Cir. 1971). cert. denied sub nom. Hoover v. Estelle, Coorections Director, 409 U.S. 1086 (1972); United States v. Lipowitz, 407 F.2d 597 (3rd Cir.), cert. denied sub nom. Smith v. United States, 395 U.S. 946 (1969); Yates v. United States, 418 F.2d 1228 (6th Cir. 1969).

The instant case is distinguishable factually from United States v. Trudo, supra. There, the Court of Appeals found that confessions admitted in a joint trial raise a Bruton problem unless they in no way incriminate the co-defendants. The redacted confessions offered there were found to have been properly admitted because they "only inculpated the person making the admission." 449 F.2d at 652.

Here, under all the circumstances of this case, Mr. Glover's confession, even with the proposed redactions, would still incriminate his co-defendants when presented to the jury and considered by it in context with the video-tapes and all the other evidence in the case. Our ruling is consistent with the reasoning of Trudo.

But there was some support in theory at least for the Government's position, and the prosecutor was

proceeding in good faith. In United States v. Cassino, 467 F.2d 610 (2d Cir. 1972), cert. denied, 410 U.S. 913 (1973), a Government agent on cross examination, testified that one defendant's confession contained references to his co-defendants. One of the co-defendants moved to be severed. After denying his motion, the trial judge "promptly and carefully instructed the jury not to speculate as to the 'other defendants' mentioned in the confession." 467 F.2d at 623. This action was upheld on appeal:

> "In determining whether a co-defendant's Bruton rights are violated in situations analogous to the one before us, courts have interpreted Bruton to require reversal only if (1) the testimony concerning the complaining co-defendant is clearly inculpatory and (2) the testimony is vitally important to the government's case." (emphasis added.) 467 F.2d at 623.

United States v. Cassino, supra, and cases cited therein, demonstrate that trial judges must exercise discretion in applying Bruton on a case by case basis. Accordingly, at that early stage of the trial, the Government was not so clearly wrong as to be in bad faith, in arguing that the Court might admit a redacted version of Mr. Glover's confession.

As an additional point, the Government urges that admission of Glover's confession would, at most, be harmless error beyond a reasonable doubt. See Harrington v. California, 395 U.S. 250, 254 (1969); United States ex rel. Nelson v. Follette, 430 F.2d 1055, 1058 (2d Cir. 1970); United States ex rel. Joseph v. LaVallee, 415 F.2d 150, 153 (2d Cir. 1969). But a Court should not commit "harmless error" knowingly.

Under all the circumstances of this case, exclusion of Mr. Glover's confession was necessary to protect the rights of co-defendants, and entirely consistent with the Bruton holding. In retrospect, the Government might have avoided the Bruton problem and the double jeopardy issue which it now raises had it anticipated the possibility of such a ruling, or had it tendered the issue at one of several pre-trial conferences held in the case. Nonetheless, at least when viewed prospectively, and prior to trial, the issue whether a redacted confession could have been received was one on which reasonable men might have differed. As will be explained below, this point is of importance in determining whether a second trial would violate Mr. Glover's Fifth Amendment rights.

The Supreme Court, in Illinois v. Somerville, 410 U.S. 458 (1973), recently decided, has clarified the rule as to when declaration of a mistrial is justified and under what circumstances the defendant may be retried without violation of his Fifth Amendment rights. The Court's opinion in Somerville relied upon a "manifest necessity" or "the ends of public justice" test, and in so doing held that: "the mistrial met the 'manifest necessity' requirement of our cases, since the court could reasonably have concluded that the 'ends of public justice' would be defeated by having allowed the trial to continue." 410 U.S. at 459. Somerville, and its progenitors provide that the declaration of a mistrial due to prosecutorial procedural error does not always bar a retrial.

The "manifest necessity" standard was pronounced nearly one hundred fifty years ago in the landmark decision United States v. Perez, 9 Wheat. 579 (1824).

> "[T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest

> necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere." 9 Wheat. at 580.

To the present, no mechanical rules for the application of that abstract criterion has been stated, nor could they be. Supreme Court and lower court decisions, following Perez have adhered to its instruction that in applying the test all circumstances are to be taken into account. United States v. Jorn, 600 U.S. 479 (1971); Wade v. Hunter, 336 U.S. 684 (1949):

> "[T]he essential question in each case involving double jeopardy contentions after the declaration of a mistrial has been whether the trial judge abused his discretion in terminating the trial short of verdict." United States v. Castellanos, 478 F.2d 749, 751 (2d Cir. 1973).
>
> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." Gori v. United States, 367 U.S. 364 (1961).

What constitutes abuse of discretion can only be de-

termined by examining prior case law. See Illinois v. Somerville, 410 U.S. at 463-64.

In Somerville, the defendant was indicted before an Illinois grand jury for the crime of theft. After the jury had been impanelled and sworn, the prosecution realized that the indictment was procedurally deficient under Illinois law. The defect was "jurisdictional". If this case proceeded to trial and the defendant were found guilty, his conviction would be reversed on appeal, and he would have been retried. Under these circumstances the trial judge concluded, with reason, that it was useless to proceed further and granted the prosecuting attorney's motion for a mistrial. Mr. Somerville, convicted after a second trial, sought post conviction relief based on his Fifth Amendment right not to be placed in jeopardy twice for the same crime. The Supreme Court found that the trial judge had not abused his discretion.

The Somerville opinion briefly discussed the facts operative in some of the earlier decisions in which the "manifest necessity" test had been applied. The Supreme Court concluded that "virtually all of the cases turn on the particular facts and thus escape meaningful categorization." 410 U.S. at 404.[4]

However, more extended treatment was accorded Downum v. United States, 372 U.S. 734 (1963), one of the cases on which Mr. Somerville placed heavy reliance. The Somerville court's discussion of Downum is of particular interest to us.

In Downum the defendant was charged with six counts of mail theft, and forging and uttering stolen checks. The Government knew that its key witness on two of the six counts had not been found and had not been served with a subpoena, yet it allowed a jury to be selected and sworn. A short time later, before any evidence had been offered, the Government apparently discovered its mistake and moved for a mistrial on the ground that its key witness was not present. The motion was granted over defendant's objection as was his motion to dismiss two counts for failure to prosecute. At a second trial, begun two days later, the defendant's plea of double jeopardy was overruled, and he was convicted on all six counts. The Supreme Court reversed, finding that the absence of the witness did not warrant a mistrial.

The Downum case was characterized by Mr. Justice Rehnquist, writing for the Court in Somerville, as a situation "where the mistrial entailed not only

a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." 410 U.S. at 469. By contrast,the Court found that the Somerville trial judge's action was

> " ... a rational determination designed to implement a legitimate [Illinois] state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant ... We cannot say that the declaration of a mistrial was not required by 'manifest necessity' and the 'ends of public justice' ." 410 U.S. at 469.

The case before us is unlike Downum, where the prosecutor's conduct was so negligent as to constitute a callous disregard for the defendant's rights. Here, as has already been discussed, the Government was not clearly in such error as to constitute bad faith, either in joining Glover or in arguing that the confession could be admitted in redacted form. Here, also unlike Downum, the prosecution did not seek a mistrial so that it would be able to strengthen its case against Mr. Glover. The procedure the Government has followed has not been manipulated so as to prejudice movant.

The instant case is also unlike United States v. Jorn, 400 U.S. 470 (1971), where the trial judge granted a mistrial, sua sponte, when he concluded that defendant taxpayers had not been adequately warned of their constitutional rights before speaking to the Internal Revenue Service. The Supreme Court, per Mr. Justice Harlan, found that the trial judge abused his discretion by "abruptly" declaring a mistrial without taking into account all the circumstances of the case, and without fully hearing counsel's arguments. United States v. Jorn, 400 U.S. at 4[illegible].

Here, we declared a mistrial only after careful consideration of all the circumstances and extended discussions with counsel, who were allowed to ponder the problem over a week-end. We decline to place great weight on the Government's suggestion that Mr. Glover has "benefitted (sic) from the severance and has not shown or even alleged any 'embarrassment, expense and ordeal and ... anxiety or insecurity' as a result thereof." Gov't. Memo. p. 27, quoting Green v. United States, 355 U.S. 184, 187.

United States v. Jorn, supra, a later case, has discredited the application of such consideration where the mistrial was not declared in the sole interest

of the defendant. 400 U.S. at 483. Here, we are not in a position to make a post hoc evaluation as to which party, the Government or Mr. Glover, benefited most from our declaration of a mistrial. It is true that Mr. Glover was spared a joint trial with narcotics wholesalers so rich and powerful that they had attempted to bribe police officers with $215,000.00.[5] But the Government was also benefited by the mistrial because it did not have to proceed without its most incriminating evidence, Mr. Glover's confession.

Society had the greater interest, for the reasons aforementioned, in completing the trial of Campopiano and severing Glover for retrial. Coming as it did, when the prosecutor had barely begun to elicit evidence against Glover, the granting of a mistrial effected no significant prejudice of a material nature, with respect to his rights. This case presents a clear example of "some important contravailing interest of proper judicial administration" (Illinois v. Somerville, 410 U.S. 458, 471, citing United States v. Jorn, 400 U.S. 470). Here "the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public Justice." (Illinois v. Somerville,

supra, at p. 471, citing Wade v.Hunter, 336 U.S. 684).

Retrial of Mr. Glover is not barred by the Constitutional prohibition of double jeopardy. The motion is in all respects denied.

Following a period of ten (10) days to permit such other and further proceedings, if any, as the parties may consider appropriate to be conducted before me, this proceeding will be submitted to the Assignment Committee of this Court for reassignment to another Judge for retrial pursuant to Rule 16 of the Local IAC Rules.

So Ordered.

Dated: New York, New York
December 14, 1973

CHARLES L. BRIEANT, JR.
CHARLES L. BRIEANT, JR.
U.S.D.J.

FOOTNOTES

1. Each was a second narcotics offender, as defined by 21 U.S.C. Section 841 (b)(1)(a).

2. Counsel had previously suggested that no probable cause existed for the arrest of Glover. The arrest led to the making of the statement.

3. See, for example, United States ex rel. Ross v. LaVallee, 448 F.2d 552, 554 (2d Cir. 1971) in which the co-defendant when questioned about his selling of narcotic drugs replied, "Gee whiz, we're just trying to make a few bucks." The Court of Appeals held:

> "Petitioner contends that in the context in which it was made, this admission incriminates him, even though it did not refer to him by name. In the District Court Judge Foley concluded that 'the testimony of the detective to which petitioner now objects is not the type of 'powerfully incriminating' statements to which the Supreme Court referred in Bruton.' As to whether this statement was incriminating, we must disagree. Petitioner was arrested with his brother. Given this context, there can be no doubt that his brother's reference to 'we' included petitioner. In this sense, the admission was damaging to petitioner's cause. Though petitioner was not mentioned by name, we have little doubt that he was incriminated by his brother's admission."

While the Court in Ross, supra, held, under the facts of the case the error was "harmless" as "the evidence ... was so overwhelming that the jury would have convicted in any case," it nevertheless clearly held that admission of the statement violated petitioner's rights. We should not confuse the existence or non-existence of Bruton rights with the entirely separate question of what the sanction would be upon appeal, for their violation.

4. Illustrative factual circumstances under which the "manifest necessity" test was found to have been satisfied are: Wade v. Hunter, 336 U.S. 684 (1949), a mistrial was declared when military tactical considerations made necessary the withdrawal of a charge in a court martial; Lovato v. New Mexico, 242 U.S. 199 (1916), the defendant demurred to the indictment, a jury was sworn, but then dismissed when the prosecutor realized that the defendant had not pleaded; Thompson v. United States, 155 U.S. 271 (1894), a mistrial was declared when the trial judge discovered that one of the jurors had served on the grand jury which voted the indictment; Logan v. United States, 144 U.S. 263 (1892), a mistrial was

declared when the jury was unable to agree on a verdict after forty hours of deliberation; Simmons v. United States, 142 U.S. 148 (1891), a mistrial was declared when the trial judge discovered that one of the jurors knew the defendant.

5. The Government had seized that part of the bribe actually paid, consisting of $100,000.00 in bills of $100.00 and smaller denominations. This currency was admitted in evidence, but solely against Zanfardino and Campopiano, as proof of consciousness of guilt. Most jurors had never seen so much green goods in one place at one time.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, ~~Staten~~ Island, N.Y. 10302. That on the 28th day of June, 1974 at No. ~~U.S. Attorney's Office~~ deponent served the within Appendix to Brief upon U.S. Attorney the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 28 day of June 1974

Edward J. Bailey
Edward Bailey

William J. Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975